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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

RUDOLF IVANOVICH ABEL, also known as "Mark" and also known as Martin Collins and Emil R. Goldfus,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR THE PETITIONER.

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January 15, 1959.

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The twenty-page Government statement of facts attests to the accuracy of our narrative of the pertinent events (Our Brief, pp. 3-8).* The Court is reminded that all facts set forth in our brief were taken exclusively from statements by U. S. Government officials and witnesses, or were uncontradicted in the District Court.

Several of the Government's legal arguments require a reply, however, since they manifest a misunderstanding

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* The difference in emphasis is due to our accepting as truthful the testimony of all F. B. I. agents and the arresting I. N. S. officers, whereas the Government prefers to emphasize the self-serving statements of an I. N. S. administrative official named Noto, a final witness so remarkable that he knew Petitioner's name to be Abel before either Hayhanen or the F. B. I. (200-201, 174, 289).

of the record and a misconception of what we have contended from the outset of this case.

The "Arrest" of Abel.

The Government argues at great length that "the legality of the search depends on the legality of the arrest" and that since Abel was lawfully detained for deportation any search was permissible and anything seized could be used as evidence in prosecuting him for any crime (Their Brief, pp. 23-26, 29-38). Their contention thus is that a person suspected of being an alien illegally in the United States, is wholly unprotected by the Bill of Rights.

This entire chain of reasoning rests on a false premise which may be mumbled, "an arrest is an arrest is an arrest." The truth is that what the Government termed an "arrest *sui generis*" in its District Court briefs is not an arrest at all, either civil or criminal. It is a detention process, whereby a person is taken into custody for the sole and expressed purpose of deportation from the United States. Yet the Government's basic reasoning, and the applicability of the case authority cited in its brief, rest upon the misleading assertion that there was a "valid arrest" in the case at bar.

Thus, too, the Government weaves back and forth in an elaborate defense of its process for deportation (the legality of which we have never disputed) and then leap-frogs to the unwarranted conclusion that process appropriate for deportation is also appropriate to obtain evidence of a capital crime—even when the arresting officers admittedly were convinced that such a capital crime had been committed but had decided to avoid regular criminal procedures at that time (Their Brief, pp. 5, 6, 46).*

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* As to some rights of persons detained under an administrative I. N. S. warrant, see Appendix to this Brief.

So far does the Government distort our contentions that it even states (Their Brief, p. 31) that we urge that "the Constitution requires that, even in deportation cases, warrants for arrest be judicial warrants issued on the basis of sworn testimony as is required in criminal cases by the Fourth Amendment." This of course is nonsense. Our original contention, advanced in our motion papers in the District Court (R. 25-27), is again set forth in Point II of our brief here in which we state (at page 30):

> "An administrative procedure such as that employed by the Department of Justice in the case at bar, under which the Attorney General is accountable only to himself, without any of the safeguards discussed above, *cannot and should not be the basis for a search and seizure of a man and his effects to procure evidence for use in the prosecution of a capital crime.* * * *" (Italics supplied.)

In short, at all times our contentions have been limited to the precise issues presented in the case at bar.

Decision Not to Obtain a Warrant.

In our principal brief we have shown that the search in the case at bar lacked "good faith" as defined by this Court and cannot be sustained under the rule in *Harris* v. *United States*, 331 U. S. 145 (1947). The entire answering argument of the Government is based upon their assertion that they could not obtain a criminal arrest warrant because the accomplice Hayhanen, although "cooperating", refused to testify later at a public trial (Their Brief, pp. 5, 6, 45-47).

This, we submit, is no answer at all. First, the more obvious reason for secret detention (to try to persuade Abel to aid the United States) is discussed at length in our brief (pp. 11-16). Second, there can be no question but that the Department of Justice on June 21, 1957 possessed more

than enough information to obtain a criminal warrant, based upon probable cause. (Exhibit "B", Our Brief; Their Brief, pp. 5, 6, 45-47). The statement that a cooperative informant refused to testify in public proceedings has no bearing on this issue. *Brinegar* v. *United States*, 338 U. S. 160 (1949) at pages 174-176; *Weise* v. *United States*, 251 F. 2d 867, (9th Cir., 1958), *cert. denied* 357 U. S. 936 (1958).

Even if we assumed that the Department of Justice's reason for not securing a warrant was because Hayhanen refused at that time to testify later at a public trial, the argument in the Government's brief confuses two entirely separate concepts: (1) Did they then have sufficient information to obtain a warrant?; and (2) Did they then have sufficient evidence to prosecute successfully and obtain a conviction? It is obvious that only the first consideration is germane to the issues in this case. The Government cannot justify its failure to seek a warrant of arrest upon the ground that, although it had probable cause to believe that a crime had been committed, it was dubious of a successful prosecution. *United States* v. *Bianco*, 189 F. 2d 716, 721 (3rd Cir., 1951)

The Kremen Case.

At various aching joints in its brief (pp. 30, 48-51) the Government utters a rather plaintive lament that in this Court it has met for the first time some arguments and case authorities in support of our position--unqualified from the outset--that the searches and seizures in this case violated the Fourth and Fifth Amendments. Yet in the case at bar, the basic contentions of Petitioner in his original motion papers are identical with those advanced in this Court. The motion papers (Record, p. 21) asked for an order of the District Court:

> "Directing the Respondent, United States of America, to return and to suppress for use as evidence any and all property seized on the 21st day of June, 1957 in Room 839, Hotel Latham, 4 East 28th Street, New York, New York upon the ground that said property was illegally seized without warrant, contrary to the provisions of the Fourth and Fifth Amendments to the Constitution of the United States, and for such other and further relief as to the Court may seem just and proper."

The Government now seems especially disturbed by our reference to *Kremen* v. *United States*, 353 U. S. 346 (1957), since they make painfully strained attempts to distinguish the case (Their Brief, pp. 27, 52-55). The *Kremen* case is not a "new theory", as the Government apparently believes (Their Brief, p. 51); it is simply another legal authority for our position—unqualified from the outset—that the searches and seizures in this case violated the Fourth and Fifth Amendments. The case clearly should be considered as authority whenever, as in the case at bar, a general search and seizure have occurred.

The Government's reference to the stipulation by counsel in the District Court is irrelevant; the record clearly shows that counsel there were seeking, for the procedural convenience of the Court and at its request, to identify those specific items which were to be used by the Government as evidence (R. 87, 79).

To say that the failure to cite the *Kremen* case in the District Court "deprived the trial court of the opportunity of avoiding the alleged error by suppressing the evidence sought to be introduced" (Their Brief, p. 27) can only be advanced in a whimsical spirit, since the trial court's declared position before the hearing was concluded, was (R. 131):

"I think it is the job of the F. B. I. to bring to light information concerning violations of the law and I don't think it is part of the Court's duty to tell them how they should function."

Omissions.

The Court will note that despite the labored and repetitious arguments made in the Government's brief, they apparently have regarded it as prudent to ignore certain important materials contained in ours:

1. As the Government and the judiciary have consistently done in both courts below, the brief simply ignores our citation (Our Brief, p. 12) of the authoritative statement, vouched for by the Director of the F. B. I., that illegal searches and seizures are regularly being conducted by the Government in cases of suspected espionage;

2. They ignore Exhibit "C" to our Brief, which shows how extensive was the use of evidence seized at the Latham and evidence obtained from leads involved in the Latham seizures, and they seek to minimize this evidence in a manner which could mislead the Court; instead of the 7 items which, the Government continually implies, were the only ones used in this case, there actually were over 40 such items which were used (Our Brief, pp. 41-45).

Conclusion.

Rights granted to all by the Fourth and Fifth Amendments to the Constitution of the United States have been denied to the Petitioner in the case at bar.

The judgment below must be reversed, and the case remanded for further proceedings not inconsistent with the decision of this Court.

Respectfully submitted,

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THOMAS M. DEBEVOISE, II,
Of Counsel.

Appendix.

8 CFR 242.10 *Representation by counsel.*

The respondent may be represented *at the hearing* by an attorney or other representative qualified under Part 292 of this chapter. (Italics supplied.)

Prior to amendment on January 6, 1956, 21 F. R. 97, effective February 6, 1956, the above regulation was contained in 8 CFR 242.14(b) which provided in pertinent part as follows:

> *Notice of right to counsel and release from custody.* Upon service of the warrant of arrest, the alien shall be advised of *his right to representation by counsel*, at no expense to the Government, *at the hearing to be held* under the warrant of arrest. When taken into physical custody of the Service *he shall be informed* whether he is to be continued in custody or, if release from custody has been authorized, of the amount and conditions of bond or terms of conditional parole under which he may be released. * * * (Italics supplied.)